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Supreme Court of the United States

October Term, 1926

No. 372

[redacted] DOING BUSINESS AS MORRIS [redacted] E. HEWITT AND LEW [redacted] ET AL., *Appellants*,

vs.

[redacted] DUBY, H. H. VAN DUZER AND W. H. [redacted] *Appellees*.

Appeal From the District Court of the United States for the District of Oregon.

REPLY BRIEF OF APPELLANTS

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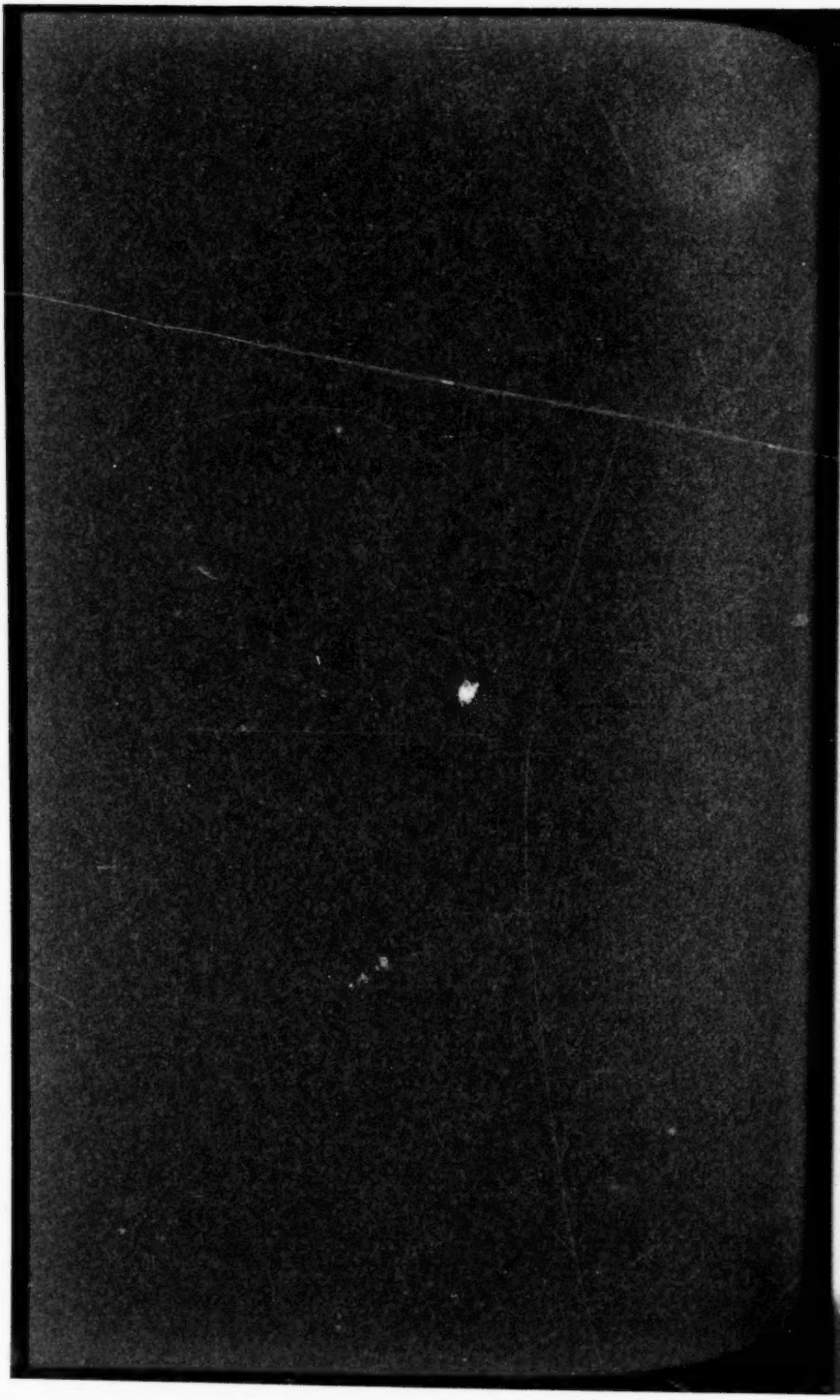

Supreme Court of the United States

October Term, 1926

No. 372

R. B. MORRIS, DOING BUSINESS AS MORRIS & LOWTHER; H. M. HEWITT AND LEW NUNAMAKER, ETC., ET AL., *Appellants.*

vs.

WM. DUBY, H. B. VAN DUZER, AND W. H. MALONE, ETC. *Appellees.*

Appeal From the District Court of the United States for the District of Oregon

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REPLY BRIEF OF APPELLANTS

W. R. CRAWFORD,
EDWIN C. EWING,
Solicitors for Appellants.

REPLY BRIEF OF APPELLANTS

We desire to say that the appellees were served with our brief in strict accordance with Rule No. 25 of the Supreme Court of the United States.

As we view the questions presented by the record it would be a waste of time to debate the various arguments advanced in the brief of the appellee, so we shall confine our reply to the questions presented in the record.

Appellees' brief calls attention to Section 1 of the Rural Post Road Act of 1916, in which the following language is used: "That the Secretary of Agriculture is authorized to cooperate with the States, through their respective State highway departments, in the construction of rural post roads;" and thereupon declare that such statement shows that the Federal Government had taken no jurisdiction over Federal aided highways, and that the State had paramount control over the same. Section 1 of such Act of 1916, in which such statement is found, was repealed by the "Federal Highway Act" of 1921, and no foundation even can be laid to base such argument upon.

We find in appellees' brief the statement that under the provisions of the Act of 1916, the Secretary of Agriculture could only "make rules and regulations for carrying out the provisions of this Act." Unfortunately again the appellees omitted any reference to Sec. 18 of the "Federal Highway Act," (appendix p. 54) in which Congress enlarged the power of the Secretary of Agriculture so as to read: "THAT THE SECRETARY OF AGRICULTURE SHALL PRESCRIBE AND PROMULGATE ALL NEEDFUL RULES AND REGULATIONS FOR THE CARRY-

ING OUT OF THE PROVISIONS OF THIS ACT, INCLUDING SUCH RECOMMENDATIONS TO THE CONGRESS AND THE STATE HIGHWAY DEPARTMENTS AS HE MAY DEEM NECESSARY FOR PRESERVING AND PROTECTING THE HIGHWAYS AND INSURING THE SAFETY OF TRAFFIC THEREON."

It is claimed by the appellees that the State directly, or by the appointment of a State highway department, can by legislative act, passed after the enactment of the Federal Act of 1916, take exclusive control over Federal aided highways without any reference to the terms and conditions under which the Government had extended financial aid. They claim that the Act of the State in 1921, as amended in 1923, authorizing the State Highway Commission to change and modify the provisions of the State Law by reducing the weight of truck and load, is legal and exclusively within the power of the State.

In other words that the defendants have the exclusive jurisdiction to reduce the gross weight of truck and load from 22,000 pounds to 16,500 pounds, which has been the weight for many years and was such weight when the Act of 1916 had been enacted. (brief p. 9, P. R. 10.)

We have cited a large number of authorities in our original brief, showing the attempts of States to override the plain provisions of Acts of Congress which had granted financial aid to States. Two of said cases cited arose in the State of Oregon. The Government endeavored to recover lands which had been granted to such State, for the purpose of giving financial aid to the State in the construction of Highways extending from the Ocean to the Idaho line. The only conditions exacted by the Government were that

such highways could be used by the Government without any tolls, and the other was that whenever a certain mileage of road had been constructed and such construction had been approved by the Governor, the State would be given a part of the public lands owned by the Government. After a lapse of some years the Government found that such roads had not been constructed and in place there was no evidence that any road had even been constructed, the Government instituted suits against divers people to recover back lands which had been sold under such land grant. The Government did not recover such lands, because the owners of the same were bonafide purchasers, and the Government lost all of such lands and the public had not received any benefit therefrom.

U. S. v. California & Oregon Land Co.
148 U. S. 31, 37 L. ed. 354.

U. S. v. Dalles Military Road Co.
140 U. S. 599, 35 L. ed. 561.

After the passage of the Rural Post Road Act of 1916, Congress, in 1918, appropriated $300,000.00 to enable the Postmaster General to experiment with the use of trucks in the vicinity of the cities of the United States so as to promote the collection and delivery of food products along the highways and machinery and materials necessary in the production of such food products. (appendix p. 48.)

With the knowledge obtained, Congress broadened the provisions of the Rural Post Road Act and amended the same by the "Federal Highway Act" of 1921, so as to authorize and direct the Secretary of Agriculture to supervise and control the construction and reconstruction of Federal aided highways, but to determine the types of surface, character of material,

width and strength of such highways, in order to furnish a permanent highway with such strength as was necessary to carry not only the then traffic, but also probable increased traffic; and that the use of said highways should be placed under the control of the Secretary of Agriculture so as to PRESERVE AND PROTECT SUCH HIGHWAYS AND SECURE THE SAFETY OF TRAFFIC THEREON. (appendix pp. 49-55.)

Again in 1922 Congress enacted penalty clauses in relation to the making, by any one, of false statements and representations concerning the projects which had come under the provisions of said "Federal Highway Act." (appendix p. 56.)

The State enacted a law in 1921, and amended the same in 1923, for the first time authorized the State Highway Commission to reduce the said weight of 22,000 pounds for truck and load, and that for over five years no attempt was made to enforce such a power so granted to said Commission.

The record discloses that the said portion of said highway West of the said East line of Multnomah County had been constructed many years prior to the portion in controversy, and had been subjected to the same use, but with increased traffic, yet no attempt has ever been made by said State Highway Commission to interfere with that portion of said Columbia River Highway; the portion of said highway East of Hood River to The Dalles was constructed and paved at the same time and with the same material, and under the supervision of the Secretary of Agriculture, yet no action has ever been attempted to reduce such weight of truck and load. (brief p. 9, P. R. 10.)

The record discloses that this State Highway Commission did single out fourteen other Federal aided

highways, being the principal highways in the State, at about the same time the order was entered in connection with this portion of said Columbia River Highway, and selected only portions of said highways, generally in the middle of their length, by a blanket order reducing such weights to 16,500 pounds; and it is charged and it is admitted that the only occasion by the order in this case and the blanket order relating to said other fourteen highways was to destroy competition and favor the railroad lines, and the steamboat lines on the Columbia River (brief p. 12, P. R. 12).

The record discloses that such action of said Highway Commission has the effect of, forcing the appellants to either operate such trucks at a great and irreparable loss, or to go out of business on said FIFTEEN PRIMARY HIGHWAYS OF THE STATE. (brief pp. 8, 12, 13, 14, P. R. 9, 10, 12, 13, 14.)

The appellants cannot double their rates for carriage, as the Public Service Commission has informed them that such increased rates would be unjust and unreasonable. By law the appellants are compelled to file schedule of rates satisfactory to the Public Service Commission and without such permission the plaintiffs cannot operate their trucks. (brief p. 8, P. R. 9, 10.)

The effect of such order and said blanket order destroy the rights the appellants have to enjoy the use of said Federal aided highways in the same manner and with the same character of equipment as had been operated many years prior to the year 1920. This attempt of the State, acting under such order of the State Highway Commission, is just exactly as was foreseen by Congress and furnishes the conclusive rea-

son for the enactment of the "Federal Highway Act" of 1921.

We desire to call this Court's attention to one case which was not cited in our original brief. The State of Maryland chartered the Baltimore & Ohio Railroad Company, in which charter the railroad company agreed to pay a portion of its earnings to the State. The company endeavored to escape the payment of such charter contract. Your Court in passing upon the question held that such provision was constitutional and did not come within the constitutional restriction in connection with interstate commerce, and that the State had the undoubted right to exact such bonus and that the railroad company could add such amount on the fares charged and collected. On navigable waters the remedy would be competition, but on highways the Court said that the same kind of relief should avail. Mr. Justice Bradley in delivering the opinion of the Court said:

> "Whether, in addition to this, Congress, under the power to establish post-roads, to regulate commerce with foreign nations, and among the several States, and to provide for the common defense and general welfare, has authority to establish and facilitate the means of communication between the different parts of the country, and thus to counteract the apprehended impediments referred to, is a question which has exercised the profoundest minds of the country. This power was formerly exercised in the construction of the Cumberland road and other similar works. It has more recently been exercised, though mostly on national territory, in the establishment of railroad communication with the Pacific coast. But it is to be hoped that no occasion will ever arise to call for any general exercise of such power, if it exists. It can hardly be supposed that individual States, as far as they have reserved or still possess the

power to interfere, will be so regardless of their own interests as to allow an obstructive policy to prevail. If, however, state institutions should so combine or become so consolidated and powerful as, under cover of irrevocable franchises already granted, to acquire absolute control over the transportation of the country and should exercise it injuriously to the public interest, every constitutional power of Congress would undoubtedly be invoked for relief. Some of the States are so situated as to put it in their power, or that of their transportation lines, to interpose formidable obstacles to the free movement of commerce of the country. Should any such system of exactions be established in these States, as materially to impede the passage of produce, merchandise or travel, from one part of the country to another, it is hardly to be supposed that the case is a *casus omissus* in the Constitution."

Balt. & Ohio R. R. Co. v. Maryland,
21 Wall, 456, 475. 22 L. ed. 678, 684.

Congress took no chances in the face of the attempts of the States to obtain financial benefits at the expense not only of the Federal Government, but of the public, who are the ultimate payers. The attempt of the State through the State Highway Commission was in line with the conduct of the same State in the construction of the present Columbia River Highway, as recited in the decisions of this Court. *Supra.*

IT IS ADMITTED THAT THE ONLY OBJECT THE STATE HIGHWAY COMMISSION HAD WAS TO ABSOLUTELY THROTTLE AND DESTROY COMPETITION ON FIFTEEN PRIMARY HIGHWAYS OF THE STATE, ALL FEDERAL AIDED, IN FAVOR OF THE RAILROAD LINES, AND THE STEAMBOAT LINES ON THE COLUMBIA RIVER.

Further it is admitted that these appellants are engaged in interstate commerce between the States of Oregon, Washington and Idaho, (brief p. 8, P. R. 9, 10) and are protected by the Commerce Clause of the Constitution of the United States.

It is further admitted that the Secretary of Agriculture has not in any way acted in connection with this attempt to override his sole authority in connection with the preservation and protection of such highways or insuring the safety of traffic thereon.

It is admitted that for the calendar year of 1925, the State Highway Commission only expended $5,000.00 in the repair and maintenance of said portion of said Columbia River Highway, being 22.11 miles in length. (brief p. 12, P. R. 12.)

THE APPELLANTS WERE WILLING AND ABLE AND OFFERED TO FURNISH A GOOD AND SUFFICIENT BOND TO PAY ALL DAMAGES WHICH MIGHT ACCRUE BY THE OPERATION OF THEIR NINE TRUCKS BY REASON OF SUCH ADDITIONAL WEIGHT OVER 16,500 POUNDS. (brief p. 12, P. R. 12.)

IT IS ADMITTED THAT THE NINE TRUCKS LIMITED TO THE WEIGHT OF TRUCK AND LOAD OF 22,000 POUNDS WITH A SPEED OF 12 MILES PER HOUR HAS NOT DAMAGED OR DESTROYED THE SAID 22.11 MILES OF SAID HIGHWAY; AND THAT SUCH PORTION OF SAID HIGHWAY IS IN AS GOOD A CONDITION AS IT HAS BEEN FOR YEARS AND HAS NEVER BEEN AND IS NOT NOW BEING DAMAGED OR DESTROYED AS SET FORTH IN SAID ORDER, BY EITHER THE OPERATION OF SAID NINE TRUCKS. (brief p. 11, P. R. 11.)

THE APPELLEES ADMIT THAT SAID ORDER WAS NOT BASED UPON EITHER THE PRESENT DAMAGE OR DESTRUCTION OF SAID PORTION OF SAID HIGHWAY, AND ALSO THAT SAID PORTION OF SAID HIGHWAY WAS IN FIRST CLASS CONDITION AND REPAIR, AS WELL AS SAID OTHER PORTIONS OF SAID HIGHWAY. (brief p. 11, P. R. 12.)

The lower Court held that such order was to relieve an emergency and as soon as such emergency was relieved of, the order would fall, and that the only power that the State Highway Commission had was to protect the highway until the emergency had ceased.

No emergency ever existed. No mention is found in appellees' brief of any emergency. Yet the lower Court rested its entire decision on such condition and the appellees have repudiated the only foundation upon which the power to issue such order rests. That is an emergency. (See opinions P. R. 18-24).

We submit that the appellants are entitled to the relief prayed for.

Respectfully submitted,

W. R. CRAWFORD,
EDWIN C. EWING,
Solicitors of Appellants.